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IN THE

Supreme Court of the United States

October Term, 1957

A. RAY SEGAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	3
Reasons for granting the writ	10
Conclusion	20
Appendix A — Statute	21
Appendix B — Opinions and Judgment below	21
Appendix C — Order below denying petition for rehearing	42

CITATIONS

Cases:	Page
Boyd v. U. S., 12 Sup. Ct. 292, 142 U.S. 450, 35 L. Ed. 1077	18
Brown v. State, 232 Ind. 227, 111 N.E. 2d 808	19
Commonwealth v. Campbell, 155 Mass. 537, 30 N.E. 72	19
Grantello v. U. S., 3 F. 2d 117 (U.S.C.A. 8)	18
Hartman v. U. S., 215 F. 2d 386 (U.S.C.A. 8)	18
Heath v. Helmick, 173 F. 2d 156	19
Kempe v. U. S., 151 F. 2d 680 (U.S.C.A. 8)	18
Kraft v. U. S., 238 F. 2d 794 (U.S.C.A. 8)	18
Martinez v. State, 130 Tex. Cr. 51, 134 S.W. 2d 276	19
Michelson v. U. S., 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168	4, 6, 10, 11, 14
Niederluecke v. U. S., 21 F. 2d 511 (U.S.C.A. 8)	18
Nichols v. Commonwealth, 312 Ky. 171, 226 S.W. 2d 796	15
Peightel v. U. S., 49 F. 2d 235 (U.S.C.A. 8)	10, 12, 13

People v. Infantino, 230 N.Y.S. 66, 224 App. Div. 193 19
Railton v. U. S., 127 F. 2d 691 (U.S.C.A. 5) 18
Roberson v. U. S., 237 F. 2d 536 14
Rounds v. State, 171 Tenn. 511, 106 S.W. 2d 212.... 19
Sloan v. U. S., 31 F. 2d 902 (U.S.C.A. 8) 10, 12, 13
Spalitto v. U. S., 39 F. 2d 782 (U.S.C.A. 8) 10, 12
Stagemeyer v. State, 113 Nebr. 9, 273 N.W. 824..... 19
State v. Bell, 206 Iowa 816, 221 N.W. 521..... 15
State v. Friend, 151 Minn. 138, 186 N.W. 241..... 18
State v. Nagy, 27 N.J.S. 1, 98 A. 2d 613..... 19
State v. Wolff, 337 Mo. 1007, 87 S.W. 436..... 19
United States ex rel. Collins v. Ashe, 176 F. 2d 606 19
Washington v. U. S., 14 F.R.D. 221 19

Statutes:

Article V of the Amendments to the Constitution of the United States 11
18 U.S.C., Sec. 1622 21

Miscellaneous:

20 Am. Jur., Evidence, Sec. 489, p. 426 19
22 C.J.S. Crim. Law, Sec. 735, p. 1267 19
22 C.J.S. Crim. Law, Sec. 820, pp. 1440, 1441 19
Underhill, Crim. Evid., 4th Ed., Sec. 265, p. 513.... 19
2 Whorton, Crim. Evid., 12th Ed., Sec. 361, p. 74... 19

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A. Ray Segal prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on August 6, 1957.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court (R. 163-167), printed in Appendix B hereto, *infra*, p. 21, is reported in 147 F. Supp. 506. The opinion of the Court of Appeals printed in Appendix B hereto, *infra* p. 26, is reported in 246 F. 2d 814.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1967, p. 41, *infra*. A timely petition for rehearing was denied September 13, 1957. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1254 (1) and Sup. Ct. Rule 23(2).

QUESTIONS PRESENTED

1. Whether petitioner was denied his constitutional right to a fair trial because the trial court permitted, over his objection, witnesses, who testified for the petitioner in respect to his reputation for truth and veracity, to be asked on cross-examination whether they had heard ". . . . . anything about the proceedings in the case of Max Herman against Joseph St. Dennis, which was in Municipal Court, City of Minneapolis, in *October 1955*, and have you heard whether in that trial the defendant, Mr. A. Ray Segal, presented to the Court and offered in evidence a card registered mail postal receipt in which it appeared that the date on the receipt had been rewritten from the time it had first been written, as to date, and that thereafter the postal authorities here in the City of Minneapolis testified that the date that was then apparently the date, the rewritten date on the card as offered in evidence, was an earlier date than the records of the Minneapolis Post Office Department, as testified to in that case showed. That thereafter Mr. Segal representing the plaintiff, whose case depended on the receipt, the claim of having been received on the date shown in the altered date, Mr. Segal then moved for dismissal of the case. Have you heard about that?"

2. Whether petitioner was denied his constitutional right to a fair trial because the trial court permitted, over his objection, testimony tending to show a subsequent attempt on the part of petitioner to commit a like separate offense.

STATEMENT OF THE CASE

Petitioner, at the time of his trial was a 59 year old native of Minneapolis who had been a practicing attorney in that city since 1932. (R. 98).

He was one of two attorneys who had represented one Nelson who had been charged with a violation of the Mann Act and tried in the U. S. District Court for the District of Minnesota in the latter part of 1953. In February of 1956 petitioner was charged under 18 U.S.C., Sec. 1622 with suborning perjury on the part of the woman Nelson had been charged with transporting. (R. 5-12). In the Nelson case she had been a government witness. (R. 21).

Petitioner pleaded not guilty and was tried and convicted in the spring of 1956. That verdict was set aside by the trial court and petitioner was granted a new trial (R. 3). The new trial again resulted in a conviction on October 24, 1956 (R. 156). Petitioner's motions for judgment of acquittal and for new trial were denied January 24, 1957 (R. 163-167), Appendix B hereto, *infra*, p. 21, 147 F. Supp. 506. Petitioner was thereupon committed to the custody of the Attorney General for a period of eighteen months and fined $2,000.00 (R. 167, 168). On appeal the conviction was affirmed by the Court of Appeals for the Eighth Circuit, Appendix B hereto, *infra*, p. 26. A timely motion for a rehearing was denied September 13, 1957. (Appendix C, *infra*, p. 42).

Every government witness whose testimony against petitioner bore directly upon the question of whether petitioner suborned perjury in the old Nelson trial was a narcotic addict, prostitute, or a convicted felon (R. 21, 22, 25, 43, 54, 63, 67). Petitioner became a witness in his own defense (R. 98). He, under oath, denied ever suborning the woman to testify falsely and ever making any statement to another that might be construed as an admission of so doing (R. 98-116). His reputation for truth and veracity thus became material, and, among others, he called seven Minneapolis attorneys to testify to the excellence thereof (R. 117, 121-123, 126, 127).

During the cross-examination of the first of these, Irving C. Iverson, counsel for the government approached the bench and stated to the court that he intended to ask the witness whether the witness had heard that in 1945, Judge LaBelle of the Municipal Court of Minneapolis had directed an attorney to report to the Hennepin County Bar Association Ethics Committee that an investigation should be conducted in regard to Petitioner having perjured himself in that he had presented to the court a post-office form receipt for registered delivery, which had been in petitioner's possession from the time it was delivered by the post-office until presented to the court, and upon which the date had been altered, and that there was conflict between petitioner's testimony and post-office records as to the time of day the letter was mailed (R. 118). Counsel for the government then handed the court a volume containing *Michelson v. United States*, (335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168) together with a paper purporting to be a copy of a letter counsel stated was written November 30, 1945 by the attorney referred to and addressed to the Ethics Committee. Counsel

for the government also handed to the court the transcript of the 1945 trial (R. 119). Neither document was offered in evidence nor was any testimony taken to support their authenticity (R. 119). The letter was printed by the government and submitted to the Court of Appeals in connection with petitioner's appeal (Supplemental Record 53-55). The government also printed and submitted to the Court of Appeals portions of the transcript of the Hermann trial (S.R. 46-52). The whole of the transcript was printed and submitted to the Court of Appeals by petitioner in connection with his petition for rehearing (R. Petition for Rehearing 39-56).

The transcript contains *no* evidence that petitioner made any change in the date which appeared on the postal receipt card, nor that the Municipal Court requested the matter be referred to the Ethics Committee. It does contain evidence that the registered letter was given to the postal messenger for delivery on August 31, 1945 (Pet. for Rehear. 48, 49) returned undelivered, and was actually delivered at 7:48 A.M. on September 1, 1945 (Pet. for Rehear. 48, 49, 47). Actual delivery of the letter on the latter rather than the former date warranted judgment against rather than for petitioner's client and the Municipal Court, therefore, suggested, for petitioner's benefit, the motion for dismissal mentioned in the last part of the question put to petitioner's character witnesses (Pet. for Rehear. 55, 56).

The copy of the letter, while accusatory of petitioner, contains the following statement:

> "It will be observed that the '9' which was originally written has been re-written to read '8' *and a '1' has been put in front of the numeral '1,'* indicating delivery 8-31" (S.R. 53, 54).

Objection was made to the proposed question to the character witnesses on the grounds that it would be prejudicial, require a trial on a collateral matter, was too remote in time, and would convey to the jury by implication that petitioner did something wrong on that occasion (R. 119, 120). The objection was overruled and counsel for petitioner were asked whether they wanted the court to give a cautionary instruction taken verbatim from *Michelson, supra*. Petitioner's attorneys assented and the instuction was given at that time (R. 120). Thereupon counsel for the government asked Mr. Iverson the question quoted in question 1, *infra*, p. 2. The same question, in almost identical language, was asked of five additional character witnesses. In each instance the witness answered in the negative (R. 121-124, 127).

In his opening statement to the jury at the commencement of petitioner's trial, the Assistant United States Attorney stated that he expected the evidence would show that sometime later on a man by the name of Godfrey Lee Barrett was indicted for the same type of offense as that with which Nelson was charged. At that point counsel for petitioner interrupted to object to any reference to or testimony concerning the Godfrey Lee Barrett case on the ground that it was irrelevant, immaterial and highly prejudicial. The objection was overruled and the Assistant District Attorney continued with a brief description of the facts in the Barrett case (R. 12-14).

Pursuing the Barrett case the government called Shelly Warren who testified that she came to Minneapolis from Pontiac, Michigan in June of 1955 (about a year and a half after the date of the alleged commission by the petitioner of the offense of which he was convicted (R. 5). She was

accompanied by Godfrey Lee Barrett and Lovie Barrett, step-brother and sister. She was twenty-nine years of age and had been a prostitute since 1947. She was asked how long she had known Barrett before leaving Michigan. An objection on the ground of irrelevance and immateriality was interposed and overruled. She was thereafter asked specific questions by the Assistant United States District Attorney which developed the details of her travels through several states and her stops in various cities, all in company with Godfrey Lee Barrett, during which time she engaged in prostitution and Barrett lived off her earnings (R. 53-54).

When she was asked whether she had a conversation with petitioner regarding Barrett's having been arrested, an objection was again interposed on the ground of irrelevance and immateriality. It was overruled. She answered that petitioner had said that Barrett was in jail on a charge of white slavery and that if she did as petitioner told her to do there would never be any trial and she didn't have anything to worry about. A motion by defense counsel that the answer be stricken on the ground that it was highly prejudicial and wholly irrelevant and immaterial was denied. She was then asked what petitioner had said in regard to what she should say. She replied that she was only told not to answer any questions that the F.B.I. asked her. Defense counsel then asked the court whether it was understood that he had an objection to all of this line of testimony as highly prejudicial. The court assented (R. 55, 56).

The witness then went on to testify that she had been mixed up and that petitioner had instructed her not to answer any questions put by the F.B.I. upon a different occasion and that upon the occasion referred to by the Assistant District Attorney petitioner told her how to answer any

question in the event she had to go to trial as a witness against Barrett. She was then asked what petitioner told her in regard to *testifying pursuant to a government subpoena*. Objection was again made upon the same grounds. There was the same ruling. She answered:

> "He told me that I was never to admit to the Grand Jury that I had ever had intercourse with Godfrey Barrett, I had ever given him any money, I had ever traveled for the purposes of prostitution, that I had only traveled on a share the expense plan and that all of us shared expenses, I had received money from my mother in ordinary mail, that I had worked at various places under aliases which I couldn't remember, because the places I worked I hadn't stayed long enough, only until I was asked for a Social Security card, that if I did that, I would never have to go to trial because I was the main witness for Barrett and that if I did that there wouldn't be any trial. And I asked him if he was going to go with me to Springfield, because I was subpoenaed to Springfield and he said it would never reach there, and he told me he defended a girl named Mary Johnson successfully in a similar case and she had listened to him and the case had been beaten, and said that he told her to say that she worked at Spiegel's Mail Order House for two months, and that she testified in that manner and, whatever the case was, was never—they beat the case anyway." (R. 56, 57).

She was then asked whether she had had any conversation with petitioner in regard to the trip itself from Michigan to Minnesota. The same objection was made and the same ruling handed down. She replied that there was none other than that she was to say that the trip was taken to seek employment and that she was sharing expenses. She was asked whether she had said anything to petitioner about

her employment or about how the expenses were paid. She replied that she had told petitioner that she was frightened of Grand Jury action because she had been arrested for prostitution and had pleaded guilty (R. 57).

The fact of the matter is that she did not testify at all. Barrett pleaded guilty upon advice of petitioner. (R. 103).

On the same trial day and while the witness was still under cross-examination, the petitioner, in chambers, moved for a mistrial on the ground that what she claimed petitioner advised her to do or testify in the Barrett case was irrelevant, immaterial and highly prejudicial. The motion was denied. A motion to strike on the same ground was taken under advisement (R. 58-60). It was later denied (R. 128, 129).

Over the same objection, again overruled, Lovie D. Barrett was permitted to testify for the prosecution that she traveled from Saginaw, Michigan to Milwaukee and then to the Twin Cities on June 7, 1955, in the company of Barrett and Shelly Warren. After they arrived in Minneapolis, Barrett and and Shelly were arrested (R. 61).

The United States Marshal was called to testify for the government only to the effect that Barrett was a prisoner under his control at one time, having been apprehended September 19, 1955. The trial court agreed with counsel for petitioner that the previously made objections applied also to the Marshal's testimony.

Government's Exhibit 6, the Information charging Barrett with Violation of the Mann Act, was received over the same objection (R. 62).

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict in principle with *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948) in that:

(a) The question asked of the character witnesses embodied an ambiguous statement of facts, and neither an affirmative nor a negative answer by the witness could in any way test or discredit his testimony on direct examination, while at the same time the jury could and almost certainly did infer wrongdoing or meretricious conduct on the part of petitioner.

(b) The trial court abused its discretion in permitting the question to be asked: in the absence of any competent evidence that the incident had ever occurred for neither was any testimony taken, nor were either the transcript or the letter offered in evidence; in the absence of any evidence in the Hermann transcript that petitioner changed or had any connection with changing the date involved; and in the face of the statement, supra, in the letter negativing a change in the identity of the day of the month from a later to an earlier one.

2. The court below had, prior to *Michelson, supra*, held that it was reversible error for the trial court to permit a character witness to be asked whether he'd heard of circumstances, ambiguous in character, which would not clearly, had they been the subject of conversation, have adversely affected defendant's reputation.

Sloan v. U. S., 31 F. 2d 920
Spalitto v. U. S., 39 F. 2d 782
Peightel v. U. S., 19 F. 2d 235

The effect of the decision below is to abrogate that salutary rule in the Eighth Circuit, apparently upon the mistaken theory that *Michelson, supra*, requires or authorizes it (Appendix B, *infra*, p. 36).

3. Petitioner has been deprived of his basic constitutional right to a fair trial under the Due Process Clause of the Fifth Amendment because the jury certainly inferred wrong doing on the part of the defendant from the improper questions asked his character witnesses; and because the trial court admitted evidence over his objection, tending to prove that petitioner had instructed Shelly Warren, a woman transported in a separate, unrelated but similar transaction, to testify falsely (R. 56).

Because of the apparent over-extension and misinterpretation of *Michelson, supra;* because neither this court nor Appellate Courts, generally, have laid down any standards for trial courts to use in judging the quality or quantity of material submitted to them as a basis or foundation for cross-examination of character witnesses; and because of the ever present tendency, too often condoned by courts, on the part of prosecutors to seek to convey to jurors, directly or indirectly, claims that defendants have not led otherwise blameless lives, the writ is appropriate in these proceedings.

1. The question put to character witnesses.

Prior to *Michelson, supra*, the Eighth Circuit had consistently held that it was improper, and reversible error, for the prosecution to put to character witnesses questions which contained ambiguous statements of fact rather than any

direct charge, and which could not be valid impeachment of the character witness.

Sloan v. U. S., 31 F. 2d 902
Spalitto v. U. S., 39 F. 2d 782
Peightel v. U. S., 49 F. 2d 235

Spalitto, supra, thoroughly discussed the subject of cross-examination of character witnesses and quoted at length from many texts. One such, quoted with approval, was Wigmore to the effect that:

". . . . . When witness A is called to support the character of B (either a witness or an accused), by testifying to his good reputation, that reputation must signify the general and unqualified consensus of opinion in the community (post Secs. 1610-1614). Such a witness virtually asserts either (a) that he has never heard any ill spoken of him or (b) that the sum of the expressed opinion of him is favorable. Now if it appears that this sustaining Witness knows of bad rumors against the other, then, in the first instance, his assertion is entirely discredited, while, in the second instance, his assertion is deficient in good grounds, according to the greater or less prevalence of the rumors. On this principle, then, it is proper to probe the asserted reputation by learning whether such rumors have come to the witness' knowledge; for if they have, it is apparent that the alleged reputation is more or less a fabrication of his own mind. It is to be noted that the inquiry is always directed to the witness' hearing of the disparaging rumor as negativing the reputation. *There must be no question as to the fact of the misconduct, or the rule against particular facts would be violated; and it is this distinction that the Courts are constantly obliged to enforce.*" (Italics supplied.)

In the same opinion *Sloan*, *supra*, was distinguished as follows:

> ". . . . . On cross-examination they were asked if they had read a newspaper statement that officers had found whisky, false whisky labels, empty bottles, and counterfeit revenue stamps in the defendant's room. The questions, in this form, did not refer to any charge or rumor against the defendant, but to the ambiguous fact that articles had been found in his room. The reading of such an account would not be in refutation of the witnesses' testimony that the defendant's reputation had been good."

It seems obvious that it makes no difference whether the adverse information concerning the accused reached the witness through his ears or through his eyes. In either event the effect upon his testimony upon direct examination should be the same. The real distinguishing feature is the *ambiguous* nature of the information. For one could conclude only by inference that the information imputed wrong doing to the accused.

In *Pieghtel*, *supra*, later decided, the charge was that the accused had wilfully misapplied funds of his employer, a banking association. His character witnesses were repeatedly asked whether they did not know that he was indebted to his bank in a substantial sum at the time the bank closed. The court held that the fact, if it were a fact, was proof neither of bad character nor of guilt of the offense charged and while no such knowledge on the part of any witness was elicited, the questions were prejudicial and the objections to them should have been sustained.

Apparently, therefore, the Eighth Circuit has abandoned its position that the question cannot pose to the witness an ambiguous state of purported facts not clearly reflecting

upon the character of the accused, but having only a prejudicial effect upon the defendant before the jury because it held, in reliance upon *Michelson, supra*, in sustaining the propriety of the question asked here that a witness can be asked whether he ever heard of an incident that "*might* have a bearing upon his good reputation". (Italics supplied) (Appendix B, *infra*, p. 36). The trial court had also relied upon *Michelson* (R. 119).

A careful examination of *Michelson, supra*, does not disclose that anywhere in it did this court state or infer that it was proper for the prosecution to ask a question embodying a statement of purported facts which, if bruited about in the form in which asked, could not possibly have affected a defendant's reputation. On the contrary, the general tenor of *Michelson* was to accept existing law, which included disapproval of questions asked so as to detail evidence or circumstances of misconduct on the part of the accused (Loc. Cit. U.S. 480, L. Ed. 176, note 17). *Michelson* has since been held to mark out the extreme limits of permissible cross-examination. *Roberson v. U.S.*, 237 F. 2d. 536 (U.S. C.A. 5th 1956). There is nothing in the question asked here (*infra*, p. 2), which tested the witness' foundation for his testimony.

The question served one purpose, and one purpose only, and that was to convey to the jury, not directly, but by implication and innuendo, the idea that the prosecutor, and the court, because it permitted the question to be asked, were of the opinion that petitioner had participated in the wrongful forging of an important document in another case.

In *Michelson, supra*, this court recognized the danger in such proceedings when the question asked was a proper one and could affect the direct testimony of the character

witnesses. It approved the cautionary instructions there given, nevertheless realizing that the instruction was of doubtful value in removing from the minds of the jury the damage done defendant as a by-product of the asking of a proper question. Here the question served no valid purpose. Unfair damage to the defendant could be the only result of its being asked.

Neither does *Michelson, supra,* support the proposition that counsel for the government can inquire about an incident which occurred over eleven years previously. No objection on that basis had been taken by the petitioner in *Michelson*, as the court there pointed out. Here such objection was made (R. 119). Other cases have held it reversible error to permit cross-examination referring to events which occurred eight, ten and twelve years prior to the time of the trial.

State v. Bell, 206 Ia. 816, 221 N.W. 521

Nuchols v. Commonwealth, 312 Ky. 171, 226 S.W. 2d 796

Again in *Michelson*, this court required that trial courts become satisfied by demonstration privately by government counsel that the event concerning which the witness is to be asked actually took place. Presumably the court meant not just any ambiguous event, but an event which, if narrated, would adversely affect a defendant's reputation. It is difficult to believe that this court meant that that requirement would be satisfied merely upon the prosecutor's statement that it occurred. Prosecutors are human and can be misled by others. It would seem basic and vital to all defendants that they be protected by requiring at least that the demonstration of the reality of the event be based upon the

oath of someone who claims to have first hand knowledge of its occurrence or, at the very least, an officially certified record of the event. Here petitioner was subjected to this terribly damaging question solely upon the statement of government counsel who clearly had no first hand knowledge of the Hermann case. The transcript and the letter were not offered and no testimony was elicited. The prosecutor's own doubts about the validity of any charge that petitioner had had to do with the falsification of any record in the Hermann case are clearly expressed in the terms of the question that he put to the character witness. He was apparently unwilling to ask the character witness a direct question embodying a charge of specific wrong doing. A complete copy of the transcript of the Hermann trial handed the court by government counsel, which appears beginning at page 39 of the Petition by Appellant for Rehearing before the Court of Appeals, fails to justify or support in any material way any charge that petitioner had to do with the changing of the entries on any document there involved. It does support the proposition that there might well have been a legitimate routine change of date, upon a post-office receipt form, made by a postal employee, because the registered letter went out for delivery on the evening of August 31, was returned and was not actually delivered until the morning of September 1st. (Pet. for Rehear. 48, 47). Strikingly enough, the government in printing its Supplemental Record in connection with the appeal omitted the portions of the testimony of the postal employee which had to do with the abortive attempted delivery on August 31 (S. R. 50-52). Neither that transcript nor any other facts in any form presented to the trial court here warranted the clear implication conveyed to the jury by the question put to petitioner's charac-

ter witnesses, that the petitioner had moved for a dismissal of the Hermann case because of any wrong doing on his part. The dismissal was invited by the Municipal Judge in the interests of petitioner's then client because the alternative was the entry of judgment against the client. The court was apparently satisfied from post office records that the missive had been delivered on September 1st rather than August 31st.

The whole of the petitioner's client's case before the Municipal Court of the City of Minneapolis depended upon whether an eviction letter was delivered on the 31st day of August. If it were not delivered until September 1st, petitioner's client's case failed. If a "w" appeared on the postal receipt form in front of the figure "1" representing the day of the month, then either that change was completely meaningless, or the "w" was placed over a figure "3". If it were superimposed over a figure "3", it clearly indicated a change adverse to the interests of petitioner and his client, in conformity with clear and certain evidence in the Hermann case that the letter was taken out for delivery on the 31st but not actually delivered until the first of September. It is, therefore, reasonable to say that the copy of a letter handed to the trial court here, taken by its four corners, did not clearly support a claim that an event occurred which, if discussed in the community, would have had an adverse effect upon petitioner's reputation for truth and veracity.

2. Evidence tending to show a like separate offense.

The government deliberately set out to prove that petitioner had attempted to commit a like separate offense in connection with the government's case against Godfrey Lee Barrett. Every question asked of some three witnesses, Shelly Warren, Lovie D. Barrett and C. Ennard Erickson

was so designed. Even the indictment against Barrett was offered and received. The procedure was precisely that thoroughly disapproved and which resulted in a reversal in *Boyd vs. U. S.*, 142 U.S. 450, 12 S. Ct. 292, 35 L. Ed. 1077. Even the portion of the conversation with petitioner, claimed by Shelly Warren to have referred to the matter for which the petitioner was being tried was elicited from her as the result of a question directed by government counsel to the circumstances of the collateral Barrett case. Although the objection to testimony concerning the Barrett transaction, as distinct from testimony bearing upon subornation of Mary K. Johnson, was clearly made to the trial court (*infra*, p. 6-9) and was again clearly presented to the Court of Appeals, it seems that the Court of Appeals misunderstood and misconceived petitioner's position. (Appendix B, *infra*, p. 32). No complaint was at any time made, nor is now being made of that portion of Warren's testimony concerning what she claimed petitioner had said to her about his transaction with Mary K. Johnson, except that it didn't happen (R. 102, 103).

The rule in *Boyd*, *supra*, is almost universally applied and particularly previously in the Eighth Circuit. *Grantello v. U. S.*, 3 F. 2d 117 (U.S.C.A. 8th); *Niederluecke v. U. S.*, 21 F. 2d 511, (U.S.C.A. 8th); *Kempke v. U. S.*, 151 F. 2d 680, (U.S.C.A. 8th); *Hartman v. U.S.*, 215 F. 2d 386, (U.S.C.A. 8th); *Kraft v. U. S.*, 238 F. 2d 794, (U.S.C.A. 8th); *State v. Friend*, 151 Minn. 138, 186 N.W. 241; *Railton v. U. S.*, 127 F. 2d 691 (U.S.C.A. 5th).

The rule is not changed and does not permit proof of a separate like offense merely because a portion or all of such evidence is claimed to have been a part of an extra judicial statement made by an accused, unless it is *impossible* to sepa-

rate the relevant material from the prejudicial collateral material. *22 C.J.S. Crim. Law*, Sec. 735, p. 1267; *22 C.J.S. Crim. Law*, Sec. 820, pp. 1440, 1441; *2 Whorton, Crim. Evid., 12th Ed.*, Sec. 361, p. 74; *Underhill, Crim. Evid., 4th Ed.*, Sec. 265, p. 513; *20 Am. Jur., Evidence*, Sec. 489, p. 426; *Commonwealth v. Campbell*, 155 Mass. 537, 30 N.E. 72; *Rounds v. State*, 171 Tenn. 511, 106 S.W. 2d 212; *Martinez v. State*, 130 Tex. Cr. 51, 134 S.W. 2d 276; *Stagemeyer v. State*, 113 Nebr. 9, 273 N.W. 824; *People v. Infantino*, 230 N.Y.S. 66, 224 App. Div. 193; *Brown v. State*, 232 Ind. 227, 111 N.E. 2d 808; *State v. Nagy*, 27 N.J.S. 1, 98 A. 2d 613; *State v. Wolff*, 337 Mo. 1007, 87 S.W. 436.

Here the government directed all of its efforts toward proving the collateral matter to the substantial prejudice of petitioner. Even the relevant admissible portion of the conversation was only accidentally narrated by Shelly Warren in response to a question which called for an answer concerning what petitioner told her to testify to in the Barrett case. The same deliberate effort to convince the jury by implication and innuendo that petitioner had forced a document in the Hermann case is apparent from the question asked of the character witness (*infra*, p. 2).

The facts and issues presented herein were properly presented to the court below, except for the challenge to the sufficiency of the transcript and copy of the letter as a foundation for the question asked of the character witnesses. As indicated, those documents were no part of the record below and were first attempted to be made so in the government's Supplemental Record. This was improper. *U. S. ex rel. Collins v. Ashe*, 176 F. 2d 606; *Heath v. Helmick*, 173 F. 2d 156; *Washington v. U. S.*, 14 F.R.D. 221.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Dated October 11, 1957.

Respectfully submitted,

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APPENDIX A

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 774. (18 U.S.C., Sec. 1622)

APPENDIX B

(Caption)

MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL

The defendant was found guilty, by a jury, of subornation of perjury, 18 U.S.C.A. 1622, and has made timely motions for judgment of acquittal and a new trial.

Extensive oral argument was had and voluminous briefs have been filed.

I am satisfied that the evidence here amply supports the verdict. The evidence and inferences to be drawn from it must be viewed in a light most favorable to the prosecution. Rule 29, F.R.C.P., Barron, Federal Practice and Procedure, Sec. 2221, et seq. and cases cited. The motion for acquittal is denied.

The motion for a new trial is based on several grounds. The Court has considered all of the grounds urged. One of them is deserving of comment.

The defendant assigns error in the admission of evidence concerning the so-called "Doering-Aron matters." One

Rebecca Aron testified at the trial on behalf of the government. She is an admitted former prostitute. Her testimony tended to support and corroborate the testimony of the government's chief witness, Mary K. Johnson (Loveless), that she, Johnson, lied and was suborned to do so by the defendant in the white slave prosecution of one Donald Nelson in October, 1953.

The Court admitted evidence, over the objection of defendant, that was designed to show that the defendant Segal had made attempts to persuade Rebecca Aron to leave town just prior to the first trial of this case in March, 1956. Aron testified that she had received phone calls "concerning my leaving town, receiving some money to leave town or something." The government, of course, had the onus of proving that the calls emanated from Segal or his representative. From the evidence produced to connect Segal with these phone calls, the jury was clearly warranted in finding the following facts, related herein in narrative.

Aron, a colored prostitute, had been maintaining a clandestine relationship for about two years with one Herb Doering, an insurance company representative from New Ulm, Minnesota. Doering is married and has a family. Periodically, he had given Aron money and gifts. Doering apparently had some influence upon Aron, and it was this influence that interfered with Segal's attempts to secure Aron's absence from his trial. To get Doering out of the way, Segal called Doering's wife in New Ulm and told her that he, Segal, had discovered that her husband was associating with a colored prostitute. Segal told her that Doering was interfering with Segal's efforts to get Rebecca Aron to leave town. The testimony of Doering himself, Mrs. Doering, Robert Whitchurch, Doering's business superior, and

Sidney Gislason, a New Ulm lawyer to whom Mrs. Doering turned for advice on the matter, tended to establish that Segal was attempting to eliminate Aron as a witness against him and that to do so he was employing oppressive measures against Aron's illicit lover, Doering. The jury would be amply justified in drawing the necessary connection between the coercion of Herb Doering and the "anonymous" phone calls to Rebecca Aron.

The defendant contends that it was prejudicial error to admit this evidence. He states in his brief:

> "Under the provisions of Title 18 Section 1503 [U.S.C.A.] it is a felony to corruptly threaten a witness in any U. S. Court proceeding and we assume the Government was attempting to show that the defendant violated this section of the statute being an offense similar to the one charged in the Segal indictment, * * * and that such evidence was admissible to show 'intent' of Segal of the crime he was charged with."

Defendant cites, as controlling, a line of cases including *Paris v. United States*, 8 Cir., 260 F. 529; *Gart v. United States*, 8 Cir., 294 F. 66; *Edwards v. United States*, 8 Cir., 18 F. 2d 402; *Fabacher v. United States*, 5 Cir., 20 F. 2d 736; and others. The issue involved in these cases was as to the admissibility of evidence of similar offenses to show an intent to commit the crime charged.

But, these cases are not controlling here for the evidence concerning the Doering-Aron matter was not admitted on the theory that there were similar offenses involved. Impeding a government witness is, of course, a crime, 18 U.S.C.A. 1503, and there is some similarity between that crime and the offense of subornation of perjury for which Segal was tried, but, this similarity is only a fortuitous circumstance

in this case. Inducing a witness to leave town is merely another form of suppressing evidence. An attempt by a defendant to suppress evidence leads to the conclusion that the evidence would be unfavorable to him. This is evidence of guilt and, as such, relevant. This is the theory upon which it is admissible, and it is admissible regardless of the crime charged. See *DiCarlo v. United States*, 2 Cir., 6 F. 2d 364, 368.

In *Carnahan v. United States*, 8 Cir., 35 F. 2d 96, the crime charged was conspiracy to violate the National Prohibition Act. There was evidence that a co-conspirator DeMayo had sought an attorney to get a witness to leave the country. Because of factors immaterial here, the evidence was not admissible as against Carnahan, but it was held properly admitted as against DeMayo.

In *Vause v. United States*, 2 Cir., 53 F. 2d 346, 354, evidence of conversations by witnesses with the defendant in which the defendant had told the witnesses to remain silent about his connection with the crime was held admissible. The offense charged was fraudulent use of the mails.

Although the evidence received on the Doering-Aron matter may have tended, incidentally, to show the commission of a separate crime, it was not admitted for that purpose; it was clearly relevant and competent to prove the crime with which the defendant was charged. *Bram v. United States*, 8 Cir., 226 F. 2d 858, 863; *Hardy v. United States*, 8 Cir., 199 F. 2d 704, 707.

This defendant had a fair trial. He was ably represented by two highly competent and skilled attorneys with years of experience in the field of criminal law. Both of them are former prosecuting officers. They were vigorous and adept in the defense. The defendant is himself a lawyer, well

versed and experienced, especially in the field of federal criminal law, and was able to be of great assistance in his own defense.

This is the second time a jury has found the defendant guilty. The first verdict, returned in March, 1956, was set aside by my colleague, Chief Judge Nordbye, solely "in the interest of justice," because of the unchallenged admission into evidence of irrelevant testimony pertaining to the relationship of defendant and a prostitute.

In the second trial, substantially the same evidence was introduced as was received in the first trial with the exception of the irrelevant evidence noted above. In addition, evidence of defendant's alleged attempt to impede the witness Aron, discussed previously, was received.

There is no indication of passion or prejudice practiced against the defendant. The jury, chosen without objection, represented a fair cross-section of the community. It was attentive throughout the trial. It was conscientious in the discharge of all of its duties. Its unanimous verdict was of guilt. This is a conclusion well supported by the evidence. The Court believes the record to be absent of prejudicial error. There is no reason or occasion for a new trial.

The motions are denied.

EDWARD J. DEVITT
United States District Judge

January 24, 1957

(Filed January 24, 1957.)

(OPINION)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,726

A. Ray Segal, Appellant, vs. United States of America, Appellee.	}	Appeal from the United States District Court for the District of Minnesota.

[August 6, 1957]

Linus J. Hammond and Richard B. Ryan for Appellant.
Clifford Janes, Assistant United States Attorney (George E. MacKinnon, United States Attorney, and Kenneth G. Owens, Assistant United States Attorney, were with him on the brief), for Appellee.

Before GARDNER, Chief Judge, and VOGEL and VAN OOSTERHOUT, Circuit Judges.

GARDNER, Chief Judge.

Appellant has appealed from a judgment and sentence of conviction on an indictment of one count charging him with the offense of subornation of perjury. The indictment charged that appellant suborned one Mary K. Johnson to commit perjury as a witness in the trial of one Donald Nelson.

In that case Nelson was charged with transporting Mary K. Johnson in interstate commerce and with conspir-

ing with one Robert Bannarn to accomplish such transportation in violation of the so-called Mann Act. In the course of this opinion we shall refer to the appellant as defendant.

In the instant case defendant entered a plea of not guilty and on trial the jury returned a verdict of guilty. The verdict, however, on motion of defendant was set aside and a new trial granted. On the second trial defendant was again found guilty and his motions for judgment of acquittal and for a new trial were respectively overruled and judgment and sentence of conviction entered upon the verdict from which defendant prosecutes this appeal.

Defendant first challenges the sufficiency of the evidence to sustain the verdict.

While the indictment contained but one count and charged but one offense it contained nine separate paragraphs each dealing with a separate subject matter. The court submitted but four out of these nine subjects of perjury to the jury. If there was proof that the testimony referred to in any one of these paragraphs was false and proved to be suborned that would sustain the charge of subornation of perjury. The trial court so instructed the jury and we believe this statement of the applicable law is not controverted by defendant on this appeal.

Of the four subject matters constituting the allegedly perjured testimony given by the witness Mary K. Johnson at the Nelson trial one was that she did not engage in prostitution between November 11, 1952 and December 31, 1952 and did not hustle in Chicago, Illinois; second, that she did not use drugs as an addict in Chicago between November 11, 1952 and December 31, 1952; third, that she did not know

she crossed a state line, and fourth, that she did not see Robert Bannarn about November 11, 1952. On the trial of the defendant she testified that her testimony on these questions given at the trial of Nelson was false and she also testified that the defendant induced her to give such false testimony. The testimony was all material to the issues involved in the Nelson case.

To sustain the charge of subornation in this case there must have been proof that the testimony given by Mary K. Johnson at the Nelson trial was false and this fact can only be established by the testimony of two witnesses or by the testimony of one witness and proof of corroborating circumstances. *Hammer* v. *United States*, 271 U.S. 620; *Hashagen* v *United States*, 8 Cir., 169 F. 396; *Arena* v. *United States*, 9 Cir., 226 F.2d 227; *United States* v. *Palese*, 3 Cir., 133 F.2d 600; *Goins* v. *United States*, 4 Cir., 99 F.2d 147. The question of the quantum of corroboration required by the rule is, however, for the jury. *Weiler* v. *United States*, 323 U.S. 606; *Doan* v. *United States*, 9 Cir., 202 F.2d 674.

On the question of the corroboration of Mary K. Johnson's testimony that she testified falsely in the Nelson case that she did not engage in prostitution between November 11, 1952 and December 31, 1952, we need not go into the sordid details recited by a number of witnesses, among them officers of the Chicago police department. We have examined the testimony and find it amply corroborates the testimony of Mary K. Johnson in the present case.

On the question of the use of narcotics the testimony of Mary K. Johnson given at the trial in the instant case was corroborated by testimony of police officers and by the testimony of a Mrs. Carlson and a Mrs. Warner. We have examined it and think it clearly sufficient to go to the jury on the question of corroboration.

On the question of the falsity of Mary K. Johnson's testimony given at the Nelson trial to the effect that she did not know whether she crossed a state line, corroboration is found in the testimony of Robert Bannarn and Rebecca Aron and other related circumstances.

The falsity of Mary K. Johnson's testimony given at the Nelson trial that she had not seen Robert Bannarn in Chicago about November 11, 1952 is corroborated by the testimony of a Mrs. Bowde who testified that Mary K. Johnson lived in an apartment building owned by her in Chicago with Robert Bannarn from November 11, 1952 to December 26, 1952, and by the testimony of Robert Bannarn to the same effect.

On this phase of the case we conclude that on the four matters submitted to the jury by the court's instructions there was ample evidence, if believed by the jury, to prove beyond a reasonable doubt that Mary K. Johnson committed perjury on the trial of the Nelson case.

It remains to consider whether the testimony was sufficient to go to the jury on the question as to whether the defendant induced Mary K. Johnson to give the above noted perjured testimony. While perjury must be established by the testimony of at least two witnesses or by the testimony of one witness and proof of corroborating circumstances, it is not necessary that the act of suborning perjury be so established. *Doan* v. *United States*, supra; *Catrino* v. *United States*, 9 Cir., 176 F.2d 884; *Cohen* v. *United States*, 2 Cir., 27 F.2d 713; *United States* v. *Silverman*, 3 Cir., 106 F.2d 750; *Outlaw* v. *United States*, 5 Cir., 81 F.2d 805. Thus in *Doan* v. *United States*, supra, which involved the charge of subornation of perjury, the applicable rule is stated as follows:

"* * * This means that while it was incumbent upon the Government to prove that the testimony given by

Georgia Martin before the Grand Jury was false, and to prove that it was thus false by two independent witnesses, or by one such witness plus corroborating circumstances, yet as to the element of subornation of the perjury, that is to say, as to whether the defendant induced the commission of the perjury on her part, 'the proof is the same as in all other crimes,—proof beyond a reasonable doubt'."

In *Catrino* v. *United States,* supra, it is said, inter alia:

"In a subornation of perjury case, proof that the defendant *induced* the commission of the offense, is not subject to this requirement."

The witness Mary K. Johnson testified positively that the defendant in the instant case induced her to give this false testimony. If the jurors believed this testimony, as they manifestly did, it was sufficient to sustain the verdict. However, we find that her testimony in this regard finds corroboration in attending circumstances. There was testimony that defendant admitted to one Shelly Warren that he induced Mary K. Johnson to commit perjury in the trial of the Nelson case, and there was proof of defendant's words and acts of admission in attempting to impede the witness Rebecca Aron on the first trial of the instant case. These and other attending circumstances will be hereinafter considered in connection with the question of admissibility of evidence. The weight of the testimony and the credibility of the witnesses were questions for the jury, at least as to this element of the offense charged, and we think, viewing the evidence in a light most favorable to the government, it was ample to prove this element of the offense beyond a reasonable doubt.

The government offered in evidence certain certificates of the Clerk of the court with attached documents designated

as "Government Exhibits 3 and 4". The certificates were to the effect that the attached documents were true copies of docket entries, term minutes, Judge Nordbye's order setting aside the jury's verdict and granting motion for judgment of acquittal and the jury's verdict of guilty in the Nelson case. The offer was objected to as follows:

> "Mr. Hammond: There is no objection by the defendant as to foundation. Defendant does object to the exhibits on the ground that they are, in the main, wholly irrelevant and immaterial and they put before the jury many matters that should not be before the jury.
>
> "Mr. Ryan: As to material parts the witness can testify.
>
> "Mr. Hammond: Most of the matters in here, that are listed in here, are things wholly irrelevant and immaterial to the trial of this case. We have no objection to Mr. Chell Smith testifying to material matters.
>
> * * * * * * *
>
> "Mr. Hammond: We have the same objection on Government's Exhibit 4 on the ground that in the main the entries therein are irrelevant and immaterial to the trial of this case."

The objection was overruled. The objection was a general one and does not point out any specific grounds for excluding the testimony. This being a case involving perjury it was incumbent on the government to prove that the perjured testimony alleged to have been given in the Nelson trial was given in a competent tribunal and that such testimony was material to the cause then on trial. In 41 Am. Jur., Perjury, Sec. 64, p. 35, it is said:

> "Thus, in order to convict a person of perjury alleged to have been committed on the trial of a case in a court of record, the production of the record in that case or of a duly authenticated transcript thereof, is essential,

unless the formal proofs of such judicial proceeding are waived or dispensed with by admission or otherwise."

We do not think this general objection called to the court's attention any specific ground for excluding the evidence, and in any event it could scarcely be said to be prejudicial.

Complaint is made of the ruling of the court in admitting into evidence testimony of one Shelly Warren to the effect that defendant admitted to her that he had induced Mary K. Johnson to perjure herself in the Nelson trial. Complaint is also made of the ruling of the court in admitting into evidence testimony that defendant had attempted to impede one Rebecca Aron as a witness in the first trial of the instant case. The evidence was clearly admissible. The acts and words of the defendant were in the nature of admissions and they tended to corroborate the testimony of the witness Mary K. Johnson. Evidence of a defendant's attempt to tamper with or impede a witness is admissible as an act of admission. *Curnahan* v. *United States*, 8 Cir., 35 F.2d 96; *Wallace* v. *United States*, 7 Cir., 243 F. 300; *DiCarlo* v. *United States*, 2 Cir., 6 F.2d 364; *Vause* v. *United States*, 2 Cir., 53 F.2d 346. As this testimony was relevant and competent to prove acts in the nature of admissions of the crime charged, the mere fact that it may have tended to prove commission of another crime did not render it inadmissible. *Bram* v. *United States*, 8 Cir., 226 F.2d 585.

It is urged that the court erred in permitting the defendant to be interrogated on cross-examination on matters not referred to in his direct examination and particularly with reference to his income tax returns and with reference to whether Jimmy Baker's place was not a principal hang-out for Minneapolis prostitutes. Defendant, having taken the witness stand in his own behalf, was subject to cross-examination

to the same extent as any other witness. That cross-examination might go to any fact in issue or to the impeachment of his credibility. *United States* v. *Lowe*, 3 Cir., 234 F.2d 919; *United States* v. *Silver*, 2 Cir., 235 F.2d 375. In accounting for his presence at 707 Bradford and at a so-called "Jimmy Baker's place" in Minneapolis, Minnesota, he had offered somewhat conflicting explanations. Mary K. Johnson had testified without objection that he told her, when talking to her prior to the Nelson trial, "Now if they ask you anything about the place at 707 Bradford, I don't want you to say that I own the house." In his testimony in chief he apparently attempted to leave the impression that the only occasion for his being in these places was in his capacity as an attorney because property of a deceased client needed to be attended to for the benefit of an estate and its heirs, and to see to the collection of rents for such estate. He later admitted that he was the owner of the property at 707 Bradford, and when being interrogated as to the collection of rents he himself suggested that he could not recollect the amounts collected but that his income tax returns would show. This was the occasion for producing certain income tax reports and interrogating him with reference thereto. They were not introduced in evidence and the cross-examination went to the credibility of the witness.

Defendant was asked whether or not a so-called "Jimmy Baker's place" was not a principal hang-out for Minneapolis prostitutes. There was no objection and the witness answered, "I wouldn't know that." Thereafter, on motion of defendant's counsel, the question and answer were stricken and no prejudice could result therefrom. Apparently defendant had a clientele frequenting these places, some of whom were confessedly prostitutes. The testimony went to the

credibility of the defendant as a witness. We think it manifest that the testimony so produced on cross-examination, in view of all the other testimony in the case, could not have been prejudicial. The scope of cross-examination is to be left largely to the discretion of the trial judge and in the absence of an abuse of such discretion, or of a manifest miscarriage of justice, reversal may not be had. *Christianson* v. *United States*, 8 Cir., 226 F.2d 646; *Glasser* v. *United States*, 315 U.S. 60. The question of the scope of cross-examination was considered by us in *Christianson* v. *United States*, supra, and in the course of the opinion in that case we said:

> "Error is charged on account of the cross-examination of the Defendant Paster. The general rules of cross-examination are well defined. They need not be restated. These general rules must have some flexibility in order that they may be properly applied to the great number of varied situations which arise. To accomplish the necessary flexibility and at the same time preserve the basic and substantive objectives of these rules, a considerable area of discretion is assigned to the trial court in applying the rules to a specific situation. Such a situation must be viewed and reckoned with by the trial court in the light of all related incidents occurring during the trial and cannot be confined to an isolated question or series of questions. While the questions complained of, which the court required Paster to answer, did not in themselves tend to prove or disprove the specific charge, they were sufficiently germane to portions of Paster's direct examination and statements of his counsel as to prevent the trial court's rulings from being an abuse of discretion."

We are of the view that the scope of cross-examination of this defendant permitted by the trial court did not constitute an abuse of discretion.

The defendant produced a number of character witnesses, some of whom were engaged in the practice of law. On cross-examination certain of these lawyer witnesses were asked the following question:

> "Have you heard anything about the proceedings in the case of Max Herman against Joseph St. Dennis, which was in Municipal Court, City of Minneapolis, in October 1945, and have you heard whether in that trial the defendant, Mr. A. Ray Segal, presented to the Court and offered in evidence a card registered mail postal receipt in which it appeared that the date on the receipt had been rewritten from the time it had first been written, as to date, and that thereafter the postal authorities here in the City of Minneapolis testified that the date that was then apparently the date, the rewritten date on the card as offered in evidence, was an earlier date than the records of the Minneapolis Post Office Department, as testified to in that case showed. That thereafter Mr. Segal representing the plaintiff, whose case depended on the receipt, the claim of having been received on the date shown in the altered date, Mr. Segal then moved for dismissal of the case. Have you heard about that?"

Over objection the witnesses were permitted to answer, each of whom answered that he had not heard of the incident. At the time of permitting this question the court instructed the jury as follows:

> "I instruct the jury that what is happening now is this: The defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if he has heard of various incidents in his career. I say to you that regardless of his answer you are not to assume

that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested."

Before giving the instruction the court asked counsel for defendant if he wished it to be given, to which counsel replied, "Yes". Out of the hearing of the jury, before propounding the foregoing question, government counsel produced convincing evidence that the incident referred to had a factual basis. While witnesses are called to support a defendant's so-called character they can and do in fact testify only to the good reputation or good name of the defendant. Hence, a witness called as a character witness may properly be cross-examined as to whether or not he ever heard of some incident that might have a bearing on his good reputation. *Michelson* v. *United States*, 335 U.S. 469; *Spalitto* v. *United States*, 8 Cir., 39 F.2d 782; 2 Wigmore on Evidence, Sec. 988; Underhill on Criminal Evidence, 3rd Ed., Sec. 141. In Underhill on Criminal Evidence, supra, referring to the scope of cross-examination of a character witness it is said:

> "But a witness to good character may be asked on cross-examination to test his credibility whether he has heard rumors of particular and specific charges of the commission of acts inconsistent with the character which he was called to prove, generally as to the grounds of his evidence, not so much to establish the truth of such facts or charges, as to test his credibility, and to determine the weight of his evidence. He may be asked if he has not heard some general report which contradicts the good reputation which he had been called upon to prove."

The witnesses here were simply asked whether or not they had heard of the incident referred to in the question. We think the cross-examination was eminently proper.

Defendant challenges the correctness of two instructions given the jury in the instant case. The court at the request of the government gave the following instruction:

> "You are instructed that the fact that Mary K. Johnson has admitted that she had committed perjury in giving false testimony in the *Donald Nelson* cases is no defense to this defendant as she is not to be considered as an accomplice to the crime of subornation of perjury. The fact that she has been a prostitute and narcotic addict or at least narcotic user is no defense to this defendant. However, you are instructed that you should receive the testimony of Mary K. Johnson with care and caution."

Of course, the instructions must be considered as a whole and not by piecemeal. When so considered we think the instruction was a correct statement of the applicable law. Mary K. Johnson was not an accomplice of the defendant as the offenses of perjury and subornation of perjury are separate and distinct offenses, and Mary K. Johnson's perjury was no defense to defendant who was charged with subornation of perjury. *United States* v. *Thompson*, Ore., 31 F. 331. It is to be noted that this instruction warns the jury that the testimony of Mary K. Johnson should be received with care and caution, and it will be observed too that the court in other instructions instructed the jury as to the credibility of witnesses, particularly noting that the testimony of Mary K. Johnson, who was in fact a prostitute and narcotic user, should be received with care and caution, and the court further meticulously instructed the jury that as to the falsity of the perjured testimony it must be corroborated, that the burden rested upon the government to prove the defendant's guilt beyond a reasonable doubt and that the presumption of the defendant's innocence remained with him

throughout the trial until such time, if ever, that he has been proven guilty beyond a reasonable doubt.

Complaint is also made of the following portion of an instruction given by the court:

> "In considering whether or not the requirement of corroboration has been met, you may consider the testimony of other witnesses insofar as it bears upon the truth or falsity of such testimony and such facts and circumstances, if any there be, which tend to throw light on the truth or falsity of such testimony and such admissions by word or act, if any, as you may find to have been made on these matters by the defendant, Segal himself."

This instruction went to the question of corroboration and what facts, if proven, might be considered by the jury for that purpose. We have already considered the question in connection with the charge that the evidence of corroboration was insufficient to satisfy the rule that perjury must be established by the testimony of at least two witnesses or by the testimony of one witness and corroborating circumstances. There was before the jury the many circumstances referred to by us in discussing the question of the sufficiency of the evidence, and in addition to those circumstances specifically pointed out by us evidence was offered by the defendant himself in the nature of extra-judicial statements of Mary K. Johnson made to special agents of the Federal Bureau of Investigation which were consistent with her testimony to the effect that her testimony in the *Nelson* case was false. These statements contained the following recitals:

> "On or about November 1, 1952 at approximately 12:00M at Olson Highway and Aldrich Ave. in Minneapolis, I met Donald Nelson after he had finished his

turn at driving a cab for the Yellow-Cab. Co. I met Don Nelson and we went into Ampy's tavern, Olson Highway and Aldrich Ave. where we ate and it was at this time that I requested him to take me to Chicago, Ill. Don knew that I was a prostitute as I had, upon many occasions, discussed my hustling with him.

"Nelson and I were later joined by Becky Arons, a prostitute, (colored) who lived with Don Nelson and another man whose name I do not choose to mention. We four then discussed the trip and we finally agreed to go and to pay Nelson, twenty-five dollars plus gas. We left Minneapolis around 5:00 a.m. in Nelson's 1952 Buick Special, red in color. We thought the police were following us so we four, Becky Arons, Nelson, myself, and the fourth fellow drove very slowly for a time. In St. Paul we stopped at a gas station on Kellogg St. and had some difficulty with the operator as neither of us wanted to pay for the gas and as a result the operator of the station called the police and the police talked to us.

"We left St. Paul around 6:00 a.m. and we headed toward Chicago with Nelson driving. We travelled slowly as we thought we were being followed by the police and Nelson was real careful and drove around for some time before we drove across the state line. Nelson made sure that we were not being followed before we crossed into Wisconsin.

"On the trip Nelson kept asking us for the rest of the money which we refused to give him until we got to Chicago. We did not intend to pay him so we, meaning my friend and I, kept giving him Marijuana (reefer) cigarettes and Don and Becky discussed the possibility of them staying a few days in Chicago whereby Becky could turn some tricks. Becky had hustled in Chicago before and knew the town.

"We four traveled to a little town about 100 miles from Chicago when Nelson told us to get out as he

knew by this time that we were not going to pay him for the trip. My friend and I got out of Nelson's car and caught a bus to Chicago. The trip cost us approximately $4.00 apiece from this little town in Wisconsin to Chicago. To the best of my knowledge, Nelson and Becky drove back to Minneapolis."

There was evidence of extra-judicial admissions by word and act of defendant, including admissions made to Shelly Warren and to one Dorothy Nelson, and his attempts to impede witness Rebecca Aron, and evidence of defendant's demeanor as a witness in his own behalf, including his evasive and contradictory testimony. This instruction made it clear to the jury what character of testimony might be considered as constituting corroboration. As heretofore indicated in this opinion the quantum of corroboration was for the jury (see *Hashagen* v. *United States*, supra) and, hence, the court very properly gave this instruction.

We have considered all the other contentions urged by the defendant but think they are without merit. Defendant has been twice tried; two juries have found him guilty; he has been represented by very able counsel, and on the whole record we think he has had a fair trial. The judgment appealed from is therefore affirmed.

(JUDGMENT)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15726 — September Term, 1956

Tuesday, August 6, 1957

A. RAY SEGAL,
Appellant,

vs.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, A. Ray Segal, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

August 6th, 1957

APPENDIX C

(Order denying Petition of Appellant for Rehearing.)

United States Court of Appeals

for the

Eighth Circuit

No. 15726 -- September Term, 1957.

Friday, September 13, 1957.

A. RAY SEGAL,

Appellant,

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the District of Minnesota.

Petition of the appellant for a rehearing in this cause having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.

September 13, 1957.

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